IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1026

SANDRA FENTON, ET AL., *Appellants*,

v.

BOSTON SCHOOL COMMITTEE, *Appellee*.

On Appeal from the Supreme Judicial Court of Massachusetts

MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE A MEMORANDUM AS AMICUS CURIAE

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes the National Education Association (NEA) and respectfully moves this Court, pursuant to Rule 42, paragraph 3, of the Rules of this Court,

for leave to file the accompanying memorandum as amicus curiae.

The interest of the NEA and its reasons for requesting leave to file a memorandum as *amicus curiae* are set forth in the accompanying memorandum.

Respectfully submitted,

DAVID RUBIN
Deputy General Counsel
National Education Association
1201 16th Street, N. W.
Washington, D. C. 20036
202/833-4451

RICHARD J. MEDALIE
ALVIN FRIEDMAN
EPSTEIN, FRIEDMAN AND DUNCAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036
202/628-7234

Attorneys for the National Education Association

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MEMORANDUM OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE

INTRODUCTION

The National Education Association (NEA), upon motion, seeks to appear as *amicus curiae* in the present case.

A letter from counsel for appellants consenting to NEA's participation as *amicus curiae* has been filed with the Clerk of this Court. Counsel for appellees have not consented to NEA's participation as *amicus curiae*, however.

NEA appears in this Court at the present stage of the proceedings to urge plenary consideration of this case on the issue whether the rights of nontenured teachers to procedural due process under the Fourteenth Amendment are violated when a public educational institution, in dismissing the teachers during their contract term, fails to provide the teachers with notice and the opportunity for a hearing.

INTEREST OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE AND ITS REASONS FOR REQUESTING LEAVE TO FILE

NEA was founded in 1857 and chartered as a nonprofit corporation by act of Congress in 1906. Its membership includes more than one million professional educators, many of whom are nontenured teachers. Its charter purpose is to improve the character and advance the interest of the teaching profession and the cause of education in the United States.

Several years ago, NEA established a fund for the protection of teacher rights, known as the "DuShane Fund," through which it has supported cases across the nation, raising issues which are the same as, or similar to, those raised in the present case. NEA has thus gained special background, experience and competence which it desires to bring to bear on the procedural due process issue raised here.

There is now pending before this Court a motion by NEA for leave to file a brief as *amicus curiae* in *Perry* v. *Sindermann*, No. 952, O.T. 1970, a case raising a closely related procedural due process issue. NEA appeared as *amicus curiae* before the Fifth Circuit in the *Perry* case. *Sindermann* v. *Perry*, 430 F.2d 939 (1970). NEA has also appeared as *amicus curiae* before this Court in *Jones* v. *Hopper*, 397 U.S. 991 (1970), *denying cert.*, 410 F.2d 1323 (10th Cir. 1969), and in a number of cases currently pending on appeal in other federal courts of appeals, which, although involving different facts, raise legal issues comparable to those presented here. See *Drown* v. *Portsmouth School Dist.*, Dkt. No. 7667, 1st Cir.;[1]

[1] The First Circuit decided the *Drown* case on December 18, 1970. NEA has not yet obtained a copy of the opinion, however.

Orr v. *Trinter*, Dkt. No. 20721, 6th Cir.; *Roth* v. *Board of Regents*, Dkt. No. 18490, 7th Cir.

For the foregoing reasons, NEA requests leave to appear as *amicus curiae*.

REASONS FOR PLENARY CONSIDERATION

1. Although the present case is before this Court on appeal by virtue of the lower court's determination that the Massachusetts Teacher Dismissal Statute does not violate any provision of the United States Constitution (*see* Jur. St. App. 10a),[2] the more basic issue decided by the Supreme Judicial Court of Massachusetts and raised in the appeal papers is whether notice and hearing are required under the due process clause of the Fourteenth Amendment when a public educational institution *undertakes to dismiss a nontenured teacher during his contract term*. This issue is closely related to the question whether such notice and hearing are required when the public educational institution, rather than dismissing the nontenured teacher, *refuses to renew his contract for the next academic year*.[3] The latter issue is now pending on

[2] "Jur. St." refers to the Jurisdictional Statement, and "Jur. St. App." refers to the Appendix in the Jurisdictional Statement.

[3] NEA believes that the distinction between dismissal and contract nonrenewal cases is one without a difference. As stated by the Rhode Island Commissioner of Education in Domenicone v. School Committee of Smithfield, May 20, 1970, at 3, 4 (unreported):

> "We believe that a 'dismissal during a school year' and a 'decision not to renew a contract for the ensuing year' are in each instance in fact a dismissal . . ., and that the only difference between the two is the point in time at which termination of service occurs . . . .
>
> "[D]ismissal . . ., whether it be during a school year or at the end of a school year can mean the end of [the teacher's] professional career."

a Petition for a Writ of Certiorari before this Court in *Perry* v. *Sindermann*, No. 952, O.T. 1970. In view of the similarity of the issues presented, NEA urges that the present case be set for plenary consideration jointly with the *Perry* case.

2. The decision of the Supreme Judicial Court of Massachusetts is in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Ferguson* v. *Thomas*, 430 F.2d 852 (1970), which requires a public educational institution to grant a due process hearing to a nontenured teacher whose employment it wishes to terminate. The decision below also is in conflict with the Fifth Circuit's decision in *Sindermann* v. *Perry*, 430 F.2d 939 (1970), *petition for a writ of certiorari filed*, No. 952, Sup. Ct., O.T. 1970, Nov. 9, 1970, which requires a hearing for a nontenured teacher who alleges—as the teachers do here—that a public educational institution has refused to renew his employment as a punishment for exercising a constitutional right.[4] *See* Brief of the NEA as *Amicus Curiae* 14-15, *Perry* v. *Sindermann*, No. 952, Sup. Ct., O.T. 1970. As the court below recognized (Jur. St. App. 8a-10a), its decision also conflicts with several recent federal district court cases. *Lucia* v. *Dugan*, 303 F.Supp. 112 (D. Mass. 1969); *Roth* v. *Board of Regents* 310 F.Supp. 972 (W.D. Wisc. 1970), *pending on appeal*, Dkt. No. 18490, 7th Cir.; *Gouge* v. *Joint School District No. 1*, 310 F.Supp. 984 (W.D. Wisc. 1970).[5]

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[4] *See also* Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970); Thaw v. Board of Pub. Instr., Dkt. No. 29488, 5th Cir., Sept. 22, 1970.

[5] *See also* Lafferty v. Carter, 310 F. Supp. 465 (W.D. Wisc. 1970). *Compare* Munro v. Elk Rapids Schools, Dkt. No. 52508, Sup. Ct. Mich., Jan. 24, 1970, *rehearing granted*, Nov. 30, 1970. The deci-

There is a vital need to resolve this conflict of judicial authorities. The procedural due process issue presented here arises with great frequency in teacher contract termination cases. NEA is aware of at least four cases now pending on appeal in the federal courts of appeals in which school authorities, without notice and hearing, have refused to renew the contracts of nontenured teachers, *Brown* v. *Portsmouth School Dist.*, Dkt. No. 7667, 1st Cir., (see Footnote 1.); *Orr* v. *Trinter*, Dkt. No. 20721, 6th Cir.; *Roth* v. *Board of Regents*, Dkt. No. 18490, 7th Cir.; *Shirck* v. *Thomas*, Dkt. No. 18790, 7th Cir. Many similar cases are pending in the federal district courts.

3. Plenary consideration of the present case is also warranted because the court below, in holding that nontenured teachers may be summarily dismissed from their employment by a public educational institution without notice and hearing, ignored this Court's holding in *Slochower* v. *Board of Higher Educ.*, 350 U.S. 551, 559 (1956), that "summary dismissal" of a teacher "violates due process of law."

So firm is the concept of procedural due process ingrained in the termination of public employment that this Court recently relied upon the *Slochower* case as a guide to its decision in *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970), which held that a recipient of welfare benefits has a right to notice and a hearing

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sion below further conflicts—at least in principle—with Freeman v. Gould Special School Dist., 405 F.2d 1153, 1161 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969), and Parker v. Board of Educ., 348 F.2d 464 (4th Cir.), *affirming* 237 F.Supp. 222 (D. Md. 1965), *cert. denied*, 382 U.S. 1030 (1966), which, although denying any constitutional right of a nontenured teacher to a hearing in a contract nonrenewal case, acknowledged such a right in a dismissal case.

prior to the termination of such benefits.[6] If a public welfare recipient cannot be deprived of his welfare benefits without procedural due process, *a fortiori*, a teacher should not be terminated from his employment relationship with the government without being accorded the same procedural rights.

4. The Supreme Judicial Court of Massachusetts also misinterpreted this Court's decision in *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961), by ignoring the analytical basis for the decision (Jur. St. App. 10a). This Court stated in *Cafeteria Workers* (367 U.S. at 895):

> "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[7]

Appellants had crucial interests at stake, including their professional reputations and their ability to pursue their chosen professions. *See, e.g., Roth* v. *Board of Regents*, 310 F. Supp. 972, 979 (W.D. Wisc. 1970), *pending on appeal*, Dkt. No. 18490, 7th Cir.; *Orr* v. *Trinter*, Civ. Action No. 70-163, S.D. Ohio, Aug. 3 1970, at 6-7 (Slip. Op.), *pending on appeal*, Dkt. No. 20721, 6th Cir.; *cf. Birnbaum* v. *Trussel*, 371 F.2d 672 (2d Cir. 1966); *Meredith* v. *Allen County War Mem.*

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[6] "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to . . . discharge from public employment" (90 S. Ct. at 1017).

[7] This Court affirmed this analytical basis of *Cafeteria Workers* in its decision in Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 1017 (1970).

Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968). Moreover, because the appellants were dismissed during their contract term, they suffered the "termination of an expectancy of continued employment, and that is an injury to an interest which the law will protect . . . ." *Bomar* v. *Keyes*, 162 F.2d 136, 139 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947); *accord, e.g., Ferguson* v. *Thomas*, 430 F.2d 852, 856 (5th Cir. 1970). Finally, appellants had significant constitutional interests which they alleged had been injured, in that they claimed they had been dismissed in retaliation for their exercise of First Amendment rights of free expression. *See, e.g., Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968); *Pred* v. *Board of Pub. Instr.*, 415 F.2d 851 (5th Cir. 1969).

Given these substantial constitutional, economic and professional interests, appellants should not have been dismissed "without a procedure calculated to determine whether legitimate grounds do exist"; "[a] full hearing was the only way" to protect these interests. *Birnbaum* v. *Trussel*, 371 F.2d 672, 678, 679 (2d Cir. 1966). As the court stated in *Roth* v. *Board of Regents*, 310 F.Supp. 972, 979-80 (W.D. Wisc. 1970), *pending on appeal*, Dkt. No. 18490, 7th Cir.: "Substantive constitutional protection . . . against nonretention in violation of . . . First Amendment rights or arbitrary nonretention is useless without procedural safeguards."[8] Thus, the court concluded in *Gouge* v. *Joint School District No. 1*, 310 F.Supp. 984, 992 (W.D. Wisc. 1970): "[A school] board's ultimate decision may not rest on a basis of which the teacher was never notified, nor may it rest on a basis to which the teacher has no fair opportunity to respond."

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[8] *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1453 (1968).

CONCLUSION

For the foregoing reasons, this Court should set this case for plenary consideration on the issue whether the rights of nontenured teachers to procedural due process under the Fourteenth Amendment are violated when a public educational institution, in dismissing the teachers during their contract term, fails to provide them with notice and the opportunity for a hearing.[9]

Respectfully submitted,

DAVID RUBIN
Deputy General Counsel
National Education Association
1201 16th Street, N. W.
Washington, D. C. 20036
202/833-4451

RICHARD J. MEDALIE
ALVIN FRIEDMAN
EPSTEIN, FRIEDMAN AND DUNCAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036
202/628-7234

Attorneys for the National Education Association

Dated: December 1970.

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[9] This question, although nonappealable, may be reviewed on appeal should this Court note probable jurisdiction on the appealable issue—whether the lower court was correct in its determination that the Massachusetts Teacher Dismissal Statute does not violate any provision of the United States Constitution. Alternatively, this Court might wish to treat the Jurisdictional Statement as a Petition for a Writ of Certiorari, under 28 U.S.C. §2103, and grant the Petition on the nonappealable procedural due process issue, or the Court might consider postponing the question of jurisdiction until after plenary consideration.